

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 24-1676

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KATIE SCZESNY; JAMIE RUMFIELD; DEBRA HAGEN;  
MARIETTE VITTI,

Appellants

v.

PHILIP MURPHY, in his official and personal capacity; STATE OF  
NEW JERSEY

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On Appeal from the United States District Court  
for the District Court of New Jersey  
(D.C. Civil No. 3:22-cv-02314)  
District Judge: Honorable Zahid N. Quraishi

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Argued on January 17, 2025

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Before: PHIPPS, FREEMAN, and CHUNG, *Circuit Judges*

(Filed: March 14, 2025)

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OPINION\*

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FREEMAN, *Circuit Judge*.

In April 2022, four nurses sued the State of New Jersey and its Governor, Philip Murphy, to challenge three of Murphy’s executive orders. The executive orders required certain private healthcare companies to maintain COVID-19 vaccination requirements for their employees. After Governor Murphy rescinded the executive orders, the District Court dismissed the case as moot. We will affirm the District Court’s order.

I<sup>1</sup>

This case concerns three executive orders issued between January and April 2022. First, Executive Order 283 required certain healthcare companies to maintain COVID-19 vaccination policies requiring workers to be “up to date with their COVID-19

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

<sup>1</sup> Because we write primarily for the parties, we recite only the facts necessary to our decision.

vaccinations.” App. 100. It also required those vaccination policies to “include a disciplinary process for covered workers’ noncompliance, which may include termination of employment.” App. 101. Several weeks later, Executive Order 290 updated the deadlines by which workers needed to provide proof of vaccination. Lastly, Executive Order 294 clarified that “up to date” vaccination included only the first booster for which a worker was eligible.

Four nurses—Debra Hagen, Jamie Rumfield, Katie Sczesny, and Mariette Vitti—are former employees of the Hunterdon Medical Center (“HMC”) in New Jersey. Each nurse received an initial round of vaccination for COVID-19 but declined to receive a booster dose due to her medical history and the risk of side effects. In April 2022, HMC fired Rumfield, Sczesny, and Vitti for non-compliance with its vaccination policy, and Hagen resigned to avoid having a termination for cause on her employment record.

That same month, the four nurses sued Governor Murphy and the State of New Jersey. They claimed that Executive Orders 283, 290, and 294 violate the United States Constitution. They sought a declaration that the executive orders are unconstitutional as applied to them, plus attorneys’ fees and any other relief that may be just and equitable.

The District Court denied the nurses’ motion for a preliminary injunction, and the nurses filed an interlocutory appeal. In June 2023, while the interlocutory appeal was pending, Governor Murphy issued Executive Order 332, which rescinded the challenged executive orders. Our Court dismissed the interlocutory appeal as moot and instructed the District Court to consider on remand whether the underlying case was moot. *See Sczesny v. Murphy*, No. 22-2230, 2023 WL 4402426, at \*1 (3d Cir. June 14, 2023). The

District Court determined that the rescission of the challenged orders meant it could not grant the nurses any relief. It also determined that no exception to mootness applied, so it dismissed the case as moot. The nurses timely appealed.

## II<sup>2</sup>

“A case generally is moot when in the course of litigation, a court finds that it can no longer provide a plaintiff with any effectual relief.” *Road-Con, Inc. v. City of Phila.*, 120 F.4th 346, 356 (3d Cir. 2024) (cleaned up). For instance, when a party seeks only prospective relief from a challenged law, the rescission of that law moots the claim. *See N.Y. State Rifle & Pistol Ass’n, Inc. v. City of N.Y.*, 590 U.S. 336, 338–39 (2020) (deeming claims moot where, during the Supreme Court’s review, the State of New York amended the challenged statute in a way that provided the challengers with the equitable relief they requested in their complaint); *Trump v. Hawaii*, 583 U.S. 941, 941 (2017) (Mem.) (deeming a case moot where the challenged executive order expired by its own terms).

We have applied this principle to COVID-19 related executive orders in two precedential opinions. Both times, when the challenged orders expired or were rescinded, we held that claims for declaratory or injunctive relief were moot. *Clark v. Governor of N.J.*, 53 F.4th 769, 776 (3d Cir. 2022) (concluding that a challenge to

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<sup>2</sup> At the outset of this case, the district court had federal question jurisdiction under 28 U.S.C. §§ 1331 & 1343. Regardless of whether the case is moot, we have jurisdiction to review the District Court’s final order under 28 U.S.C. § 1291. *Hartnett v. Pa. State Educ. Ass’n*, 963 F.3d 301, 305 (3d Cir. 2020). We review questions of mootness de novo. *Weitzner v. Sanofi Pasteur, Inc.*, 819 F.3d 61, 64 (3d Cir. 2016).

executive orders restricting in-person gatherings was “facially moot” because the orders had been rescinded in relevant part, leaving “no effectual relief whatsoever that this Court may grant in relation to those orders” (cleaned up)); *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021) (deeming a challenge to stay-at-home orders, business closure orders, and orders limiting congregation sizes moot because the orders expired, leaving “no relief that this Court can grant concerning them”), *cert. denied*, 142 S. Ct. 772 (2022) (Mem.).

Such is the case here. The nurses are seeking declaratory relief from now-rescinded executive orders. This Court can grant no effectual relief from those orders, so this case is facially moot.<sup>3</sup>

Despite facial mootness, we are “particularly skeptical” of deeming a claim moot based on an action a defendant “took unilaterally after the litigation began.” *Hartnett v. Pa. State Educ. Ass’n*, 963 F.3d 301, 306–07 (3d Cir. 2020). Thus, voluntary cessation of a challenged practice will only moot a case if it is “absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.” *Clark*, 53 F.4th at 775 (quoting *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d

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<sup>3</sup> The nurses argue that this case is not facially moot because they all remain separated from their employment at HMC and three of them have terminations on their employment records. Even assuming those injuries are fairly traceable to the challenged executive orders, the injuries are not redressable by this Court. A declaration that the executive orders were unconstitutional would not compel HMC to rehire the nurses or amend their employment records.

Additionally, the nurses’ “interest in attorneys’ fees does not save a matter from mootness.” *Ivy Club v. Edwards*, 943 F.2d 270, 276 (3d Cir. 1991).

Cir. 2019)). The defendant bears a heavy burden to make this showing. *West Virginia v. EPA*, 597 U.S. 697, 719 (2022).

These defendants have carried their heavy burden. When Murphy rescinded the challenged executive orders, he cited the progress New Jersey had made in responding to the COVID-19 pandemic. Among other things, he noted improvements in “key statistics, such as the number of hospitalized patients in the State, the number of daily positive COVID-19 cases, spot positivity, and the rate of transmission[.]” App. 137. Our precedent provides that we “generally presume that government officials act in good faith.” *Cnty. of Butler*, 8 F.4th at 230. And here, as in a prior case involving a rescinded COVID-19 executive order, “we have no reason to doubt the sincerity of [the Governor’s] justification.” *Clark*, 53 F.4th at 778.

Moreover, the nurses do not contend that Murphy rescinded the challenged executive orders *because of* this litigation. Indeed, the challenged executive orders remained in effect for more than a year after the nurses filed suit, suggesting their rescission was not motivated by the desire to moot this litigation. *See id.* (noting that “we are generally less skeptical of voluntary cessation claims where the change in behavior was unrelated to the relevant litigation”).<sup>4</sup>

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<sup>4</sup> Although the nurses do not posit that Murphy rescinded the challenged executive orders due to the risk of an adverse ruling from this Court, the dissenting opinion does. It notes that Murphy rescinded the orders in June 2023, shortly before a member of the panel considering the interlocutory appeal retired. Dissenting Op. at 4 n.4. That would concern us only if we presumed that Murphy (1) expected a decision was imminent due to the retirement, *but see* 3d Cir. I.O.P. 12.1 (governing procedures when one member of a

Finally, there is no reason to believe Murphy will reinstate the executive orders that he rescinded almost two years ago. Even assuming a reasonable likelihood that Murphy will instate *some* COVID-based vaccination-policy requirement for healthcare facilities in the future, a challenge to that future requirement would not plausibly present “the *same legal controversy* as the one before us now.” *Id.* at 781 (emphasis in original). For all these reasons, the defendants have carried their burden to show that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* at 775 (quoting *Fields*, 936 F.3d at 161).<sup>5</sup>

### III

Citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the nurses request that if we affirm the District Court’s order denying this case as moot, we should

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panel becomes unavailable), and (2) predicted that he would not prevail in the appeal, yet (3) did not attempt to moot the appeal until eleven months after the notice of appeal was filed and nearly three months after oral argument. We decline to make this series of *sua sponte* suppositions.

<sup>5</sup> The nurses also invoke the capable-of-repetition-yet-evading-review exception to the mootness doctrine. Unlike with voluntary cessation, the capable-of-repetition-yet-evading-review exception places the burden on the party opposing mootness. *Cnty. of Butler*, 8 F.4th at 231. That party must show that “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). This is a “narrow exception that applies only in exceptional situations.” *Id.*

Assuming that the capable-of-repetition-yet-evading-review exception is relevant to this case, *but see Clark*, 53 F.4th at 784 (Matey, J., dissenting) (reasoning that the exception should apply only when “the plaintiff’s alleged injury has disappeared through no action of the defendant”), for the reasons addressed in the text the nurses have not established a reasonable expectation that they will be subject to the same orders again.

nonetheless vacate the District Court’s previous order denying a preliminary injunction. But the order denying a preliminary injunction is not under review in this appeal, and the nurses did not request vacatur of that order during when it was on appeal and we deemed it moot. In any event, the nurses do not identify “any legal consequences” or “impact on ‘relitigation of the issues between the parties’” stemming from that order. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 219 n.27 (3d Cir. 2012) (quoting *Munsingwear*, 340 U.S. at 40–41); *cf. U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 676 n.10 (5th Cir. 2023) (“There is no need to vacate the preliminary injunctions because they no longer have any practical effect on the parties. . . . [D]ismissal without vacatur is the usual practice for interlocutory appeals, and we have no cause to deviate.” (internal quotation marks omitted)). Therefore, we deny the nurses’ request.

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The executive orders the nurses challenge have been rescinded, rendering this case facially moot. No exception to the mootness doctrine applies, so we will affirm the District Court’s order dismissing this case.



*Sczesny v. Murphy*, No. 24-1676  
PHIPPS, *Circuit Judge*, dissenting.

The Majority Opinion holds that the claims brought by four nurses who were fired or resigned based on their refusal to receive Covid booster shots are moot. It does so because during the course of this case, the Governor of New Jersey, Philip Murphy, rescinded the executive orders he issued. And it was those orders that required the nurses' employers to have mandatory Covid vaccination and booster policies under which the nurses were fired or resigned. There is no question that the nurses had Article III standing when they filed this suit, so even if they lost standing during the suit, the case or controversy would remain live if the loss of standing occurred under one of the recognized exceptions to the mootness doctrine. *See Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020). And one of those exceptions – for the voluntary cessation of challenged conduct – is spot on because Governor Murphy voluntarily rescinded the challenged executive orders.

The Majority Opinion recognizes that the burden of satisfying the voluntary-cessation exception is a heavy one, but then it concludes that Governor Murphy has met it. The burden is indeed a “heavy” one. *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Under Supreme Court precedent, to qualify for the voluntary-cessation exception, the defendant must demonstrate that “it [is] *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* (emphasis added); *see United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (explaining that a case is not moot if the voluntary-cessation exception applies); *Hartnett*, 963 F.3d at 306 (“When a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is *no* reasonable likelihood that a declaratory judgment would affect

the parties' future conduct.” (emphasis added)). In my view, Governor Murphy has not met that high bar, so I respectfully dissent.

As a matter of the structure of government, it is nearly impossible for the repeal of an executive order to satisfy the voluntary-cessation standard.<sup>1</sup> Even the most convincing assertions by a governor or other executive officer endure only as long as that official's tenure in office. In New Jersey, governors serve four-year terms, and they are not permitted to serve three consecutive terms. *See* N.J. Const. art. V, § I, para. 5 (1947). In June 2023, when he rescinded the executive orders, *see* N.J. Exec. Order No. 332 (June 12, 2023) (App. 134–44), Governor Murphy was one-and-half years into his second term.<sup>2</sup> So, even if in repealing the orders he made a convincing showing that he would never again require health care workers to receive Covid booster shots, he had only two-and-a-half years remaining of his term in office. And presently Governor Murphy has less than a year left in office. Thus, the most that Governor Murphy attempts to prove is that the allegedly wrongful conduct will not resume for a matter of months, and he provides no assurance as to his successor's actions. That is a far cry from the absolute clarity of proof needed under the voluntary-cessation exception to demonstrate that the challenged conduct is not reasonably expected to recur. *See W.T. Grant*, 345 U.S. at 633 (explaining that the defendant must “demonstrate that ‘there is no reasonable expectation

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<sup>1</sup> The executive orders in this case were all repealed; none expired on their own terms, so it is not necessary to consider the potential application of voluntary-cessation principles to executive orders that expire on their own terms. *Compare Trump v. Hawaii*, 583 U.S. 941 (2017) (mem.) (holding that executive orders that “expired by [their] own terms” were moot without considering the voluntary-cessation exception (alteration in original) (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987))), and *Trump v. Int’l Refugee Assistance*, 583 U.S. 912 (2017) (mem.) (same), with *County of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021) (applying voluntary-cessation principles to executive orders that expired on their own terms).

<sup>2</sup> *See Governor Phil Murphy*, State of New Jersey, <https://www.nj.gov/governor/admin/about/> [<https://perma.cc/U4X6-ARHZ>].

that the wrong will be repeated” for a case to be moot (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945))).

But even as to the remainder of his term, Governor Murphy fails to meet the heavy burden of proving mootness under the voluntary-cessation exception. He provides no affidavit or other sworn statement to that effect. And it is hard to have absolute clarity that a person will not resume conduct without any statement from that person to that effect. Without such an assurance, Governor Murphy provides no affirmative basis for a good-faith presumption that he will not reissue the executive orders.

Also, Governor Murphy’s remaining proof is feeble. He points out that he has not reissued Covid booster shot orders. But that neglects the reality that he issued those orders in response to spiking Covid rates, and in the interim, Covid rates have not spiked to that degree. Indeed, the Majority Opinion all but admits the circumstance-dependent nature of Governor Murphy’s rescission of the orders. It acknowledges his justifications for the rescission depended on “key statistics, such as the number of hospitalized patients in the State, the number of daily positive COVID-19 cases, spot positivity, and the rate of transmission.” Maj. Op. at 6 (quoting N.J. Exec. Order No. 332 (June 12, 2023) (App. 137)). Thus, Governor Murphy issued the rescission in response to key statistics about the virus, and just because those statistics have not reoccurred does not mean that he will not reissue the orders if they do. *See FBI v. Fikre*, 601 U.S. 234, 242 (2024) (explaining that the government’s assertion that it will not repeat the at-issue conduct based on “currently available information” is irrelevant to the question of whether it will repeat the conduct if circumstances change). To the contrary, he has a track record of reissuing prior rescinded orders upon rate spikes: he reinstated a public health emergency in January 2022, when the Delta and Omicron variants reemerged. *See* N.J. Exec. Order

No. 280 (Jan. 11, 2022).<sup>3</sup> In short, Governor Murphy has not provided the requisite absolute clarity that he will not reinstate the repealed executive orders.

The strongest point in Governor Murphy’s favor is the prognostication made in this Court’s decision in *Clark v. Governor of New Jersey* that “the return of the same pandemic and the same restrictions [is] unlikely.” 53 F.4th 769, 778 (3d Cir. 2022). But *Clark* was a challenge to restrictions applicable to religious gatherings – unequivocally, an extreme limitation on liberty. *See id.* at 780; *cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (per curiam); *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam). Unlike those restrictions, however, vaccine mandates for many diseases have become commonplace. So, while it may require another once-in-a-lifetime event for a state to prohibit its residents from gathering in large groups, it is not so out of the ordinary for a state to require nurses to receive vaccines. Thus, the *Clark* prediction – made with respect to a ten-person gathering limitation – does not extend to a government mandate to receive a Covid booster shot.<sup>4</sup>

At bottom, my position is simple: without meeting the heavy burden of voluntary cessation, Governor Murphy may be held constitutionally accountable in court by those persons aggrieved by his prior executive orders. That does not necessarily mean that the repealed orders are unconstitutional – only that they cannot escape judicial review.

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<sup>3</sup> <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-280.pdf> [<https://perma.cc/8PGA-5FQU>].

<sup>4</sup> This case is also different from *Clark* because in that case there was “no reason to doubt the sincerity of th[e] justification [for rescinding the at-issue orders],” *Clark*, 53 F.4th at 778; *see also County of Butler*, 8 F.4th at 230–31, yet here some cause for concern exists. Governor Murphy rescinded those executive orders well after Covid cases subsided but just days before the scheduled retirement of one of the judges on the panel considering the appeal of the denial of preliminary injunctive relief in this case – and therefore just days before a ruling could be reasonably expected. And without an affidavit or other explanation from Governor Murphy about that timing, it is a cause for curiosity.

Because the Majority Opinion holds that this case is now outside of the ambit of judicial review, I respectfully dissent.